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IN THE
COURT OF APPEALS OF INDIANA

SHEILA D. KOHL,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 06A01-0604-CV-160
	)	
EDWARD E. KOHL,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE BOONE CIRCUIT COURT
The Honorable Steve David, Judge
Cause No. 06C01-0406-DR-298

December 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The trial court dissolved Edward E. Kohl's and Sheila D. Kohl's marriage. Sheila appeals, Edward cross-appeals, and both present the following restated issue for review: Did the trial court err when it divided the marital estate?

We affirm.

The facts favorable to the judgment are as follows: Edward and Sheila were married on October 1, 1994. Edward and Sheila have two children born of the marriage. On June 7, 2004, Edward filed a petition to dissolve the marriage. Following hearings, the trial court, *sua sponte*, issued findings of fact and conclusions, which stated, in relevant part:

> 14. Certain real and personal property has been acquired during the marriage [that] must be divided.
>
> 15. Certain debts have been acquired during the marriage [that] must be allocated between the parties.
>
> 16. Each party is granted as [his/her] sole and exclusive personal property that which is in [his/her] possession except that [Sheila] shall be entitled to the Wobble Light and the kitchen cabinet insert(s). [Edward] shall be awarded his drafting desk, the two file cabinets in the basement, the old TV, the five metal shelves and the basket ball goal, the antenna from the attic and any other personal property of his in the garage or elsewhere.
>
> 17. In addition, to the extent that they have not done so already, that personal property which is in the basement shall be divided to the parties' mutual satisfaction within three weeks of the date of this [o]rder. . . .
>
> 18. In addition, to the extent that they have not already divided the tapes, cds, and photographs to their mutual satisfaction, each shall make one duplicate copy of each item in [his/her] possession and give to the other and the total costs incurred by both parties shall be split equally between the parties.

19. [Sheila] shall receive the Marital Residence as her sole and exclusive real estate . . . . The [trial] [c]ourt values the marital residence at $86,000.00. The mortgage on the Marital Residence is $28,573.50 and [Sheila] shall be solely liable for any liability thereon . . . .

20. The parties shall split the credit card/frequent flyer miles existing on the date of the filing of [the dissolution] [p]etition[] 50-50 . . . .

21. [Sheila] is awarded the Tahoe with a value of $27,685.00 and a debt of $13,682.00; the tanning bed with a value of $500.00; the Forum account(s) of $2,000.00; [and] the 2003 tax refund of $2601.00[.]

22. [Edward] is awarded the boat and trailer with a value of $6,000.00; the hot-tub with a value of $800.00; the Jet Ski with a value of $1,000.00; the 2002 Chevy Cavalier with a value of $5,535.00 and a debt of $5,918.00; the Forum account(s) of $500.00; [and] the "bonus" of $2,880.00.

23. [Edward] shall be solely responsible for the Elan Credit Card debt in the amount of $907.00 . . . .

24. . . . The [trial] [c]ourt finds that [Sheila's] personal property is likely more valuable than [Edward's] personal property and the [trial] [c]ourt finds the difference to be approximately $4,000.00, in favor of [Sheila].

25. The Kohl note is valued at $4,925.00 and any proceeds received from the note shall be split evenly between the parties and therefore the parties respective value would [] each be between 0 dollars and $4,462.50.

26. The [trial] [c]ourt finds that the cash value of each of the part[ies'] life insurance is approximately equal and each shall be awarded any cash value in [his/her] own life insurance policy existing as of the date of the separation.

* * *

28. The [trial] [c]ourt finds that this is a ten[-]plus year marriage and the presumptive 50-50 distribution is not appropriate . . . under the circumstances of this case. The slight deviation from the 50-50 split is justified as the [trial] [c]ourt finds that a division of approximately 45% [sic] for [Edward] and 65% for [Sheila] is justified. The [trial] [c]ourt has considered the fact that a portion of the equity of the Marital

> Residence already existed at the time of the marriage as the property was already owned by [Sheila]. It would be inappropriate to allow [Edward's] portion of the marital estate to be based upon the equity increase in the Marital Residence from the date of the marriage as [Sheila] already owned the home at the time of the marriage and already had some equity in the home. In addition the [trial] [c]ourt has considered the fact that [Edward's] income and earning potential is far superior to [Sheila's]. Furthermore, the [trial] [c]ourt has awarded primary physical custody of the children to [Sheila]. All of these factors justify a deviation from the presumptive 50-50 [division].
>
> 29. [Edward's] IRA has a value of $13,035.00 and a 401(K) in the amount of $27,308.00 and both shall be set off in their entirety to [Edward].
>
> * * *
>
> 31. For purposes of the Decree of Dissolution, the [trial] [c]ourt finds that the net Marital Estate is $132,994.75.
>
> 32. The result of the [trial] [c]ourt's distribution is that the net Marital Estate awarded to [Edward] is valued at $50,233.00 and the net Marital Estate awarded to [Sheila] is valued at $82,761.75.
>
> 33. [Edward] shall pay a portion of [Sheila's] attorney fees in the amount of $500.00 . . . .

Appellant's Appendix at 8-11.

On October 21, 2005, Sheila filed a motion to correct errors. In Sheila's motion, she asserted the trial court erred, in relevant part, by: (1) attributing to both parties $4,462.50 as one-half of the value of the "Kohl note," *id.* at 10; (2) awarding Edward forty-five percent of the martial estate, thus, when combined with the trial court's award of sixty-five percent of the marital estate to Sheila, purportedly distributing one-hundred and ten percent of the marital estate; (3) failing to "rule on an asset of $1,900.00 which is the amount [that] [Edward] took from the children's savings account[,]" *id.* at 13; (4) failing to cite that Edward entered the marriage with "substantial debt" as a justification

for deviating from the presumptive 50-50 split, *id.* at 14; and (5) using inconsistent valuation methods regarding the Tahoe and the Cavalier. Edward responded to Sheila's motion by requesting, among other things, that the trial court correct its dissolution decree to reflect that Edward should receive approximately forty-five percent and Sheila fifty-five percent of the martial estate. Edward opposed Sheila's proposed correction because, he asserted, it did not reflect the trial court's intent to effectuate only a "'slight deviation' from an equal division . . . ." *Appellee's Brief* at 3.

On December 23, 2005, the trial court, pursuant to Sheila's motion to correct errors, changed the value of the "Kohl note" assigned to Edward and Sheila as "1/2 [each] of $2,462.50[,] or $1,231.25[,]" *Appellant's Appendix* at 23, and corrected its order to reflect that Edward should receive approximately thirty-five percent and Sheila should receive approximately sixty-five percent of the marital estate. The trial court denied Sheila's motion in all other respects relevant to this appeal. On January 9, 2006, Sheila filed a "Motion for Clarification and Corrective Entry on the Court's Order on the Motion to Correct Errors Pursuant to Trial Rule 60," which the trial court denied. *Id.* at 25. Sheila now appeals, and Edward cross-appeals.

Sheila and Edward contend the trial court erred when it divided the marital estate.[1] The division of marital assets lies within a trial court's sound discretion, and we will

[1] Sheila also asserts "the [t]rial [c]ourt's decision to deny the Motion for Clarification and Corrective Entry on the Court's Order on Motion to Correct Errors pursuant to Trial Rule 60 [was] clearly against the logic and effect of the facts and circumstances before [it]." Sheila, however, fails to further develop this argument. Sheila's argument in this regard, therefore, is waived. *See Steiner v. Bank One Ind., N.A.*, 805 N.E.2d 421 (Ind. Ct. App. 2004) (a party waives any issue it fails to cogently develop or adequately support with citation to authority).

reverse only for an abuse of that discretion. *J.M. v. N.M.*, 844 N.E.2d 590 (Ind. Ct. App. 2006), *trans. denied*. An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* When we review a challenge to the trial court's division of a marital estate, we may not reweigh the evidence or reassess the witnesses' credibility, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. *Id.* Moreover, the party seeking an alteration of the trial court's decision must overcome a strong presumption that the trial court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions upon appeal. *Id.*

Where, as here, the trial court *sua sponte* enters specific findings of fact and conclusions, we review its findings and conclusions to determine whether the evidence supports the findings, and whether the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97 (Ind. Ct. App. 2005). We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake was made. *Id.* We neither reweigh the evidence nor assess the witnesses' credibility, and consider only the evidence most favorable to the judgment. *Id.* Further, "findings made *sua sponte* control only . . . the issues they cover and a general judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." *Fowler v. Perry*, 830 N.E.2d at 102.

Sheila argues the trial court abused its discretion because the trial court's property division did not reflect its finding that Sheila should receive approximately sixty-five percent of the marital estate. Edward counters, asserting the trial court did, in fact, award Sheila "approximately . . . 65%" of the martial estate. *Appellant's Appendix* at 10. Our calculation of the trial court's division of the marital estate is as follows:

Asset	Sheila	Edward
Personal Property	$4,000.00	
Residence	$86,000.00	
Tahoe	$27,685.00	
Tanning Bed	$500.00	
Forum Account(s)	$2,000.00	
2003 Tax Refund	$2,601.00	
Boat/Trailor		$6,000.00
Hot-tub		$800.00
Jet Ski		$1,000.00
Cavalier		$5,535.00
Forum Account(s)		$500.00
Bonus		$2,880.00
Kohl Note	$1,231.25	$1,231.25
I.R.A. Account		$13,035.00
401(K) Account		$27,308.00
Total	$124,017.25	$58,289.25

Liability	Sheila	Edward
Residence	$28,573.50	
Tahoe	$13,682.00	
Cavalier		$5,918.00
Credit Card		$907.00
Total	$42,255.50	$6,825.00

	Marital Estate	Sheila	Edward
Total Assets	$182,306.50	$124,017.25	$58,289.25
Total Liabilities	$49,080.50	$42,255.50	$6,825.00
Net Value	$133,226.00	$81,761.75	$51,464.25
Percentage	100	61.370716	38.629284

The trial court purported to award Sheila approximately 65% of the parties' marital estate. After dividing the martial estate, the trial court actually awarded Sheila 61.37%. Upon appeal, we will affirm the trial court's award if it comes close to the attempted apportionment. *Shannon v. Shannon*, 847 N.E.2d 203 (Ind. Ct. App. 2006). Whether a particular deviation strays too far afield from the attempted apportionment

such that it becomes substantial depends upon the size of the marital estate. *Hoskins v. Hoskins*, 611 N.E.2d 178 (Ind. Ct. App. 1993).

In this case, the trial court's actual property division of the parties' marital estate, which had a net value of $133,226, deviated from its attempted apportionment of "approximately" 65/35 by $4,835.15 and 3.63%. *Appellant's Appendix* at 10. Under the facts of this case, the trial court's property distribution was sufficiently close to the attempted 65/35 split, and, therefore, the trial court did not abuse its discretion in this regard. *See Shannon v. Shannon*, 847 N.E.2d 203 (two percent deviation from attempted fifty-fifty split of a marital estate with a net value of $102,000 was not an abuse of discretion); *Cox v. Cox*, 580 N.E.2d 344 (Ind. Ct. App. 1991) (six percent deviation from attempted fifty-fifty split of a marital estate with a net value in excess of $409,000 was insubstantial), *trans. denied*; *cf. Hoskins v. Hoskins*, 611 N.E.2d 178 ($1,600 deviation from attempted fifty-fifty split of a marital estate with a net value of approximately $26,000 was substantial).

Edward cross-appeals, contending the trial court abused its discretion when it awarded Sheila the entire value of the marital residence and that doing so was "tantamount to excluding the home from the marital pot." *Appellee's Brief* at 15. Edward argues the trial court should have awarded him half of the value of the marital residence. Ind. Code Ann. § 31-15-7-5 (West, PREMISE through 2006 2nd Regular Sess.) states:

> [t]he [trial] court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence,

including evidence concerning the following factors, that an equal division would not be just and reasonable:

> (1)The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
> (2) The extent to which the property was acquired by each spouse:
> (A) before the marriage; or
> (B) through inheritance or gift.
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
> (5) The earnings or earning ability of the parties as related to:
> (A) a final division of property; and
> (B) a final determination of the property rights of the parties.

The trial court awarded Sheila the entire value of the marital residence. In support of its deviation from the presumptive fifty-fifty division, the trial court provided the following justifications: (1) Sheila owned the residence prior to the parties' marriage; (2) Sheila had equity in the residence prior to the parties' marriage; (3) Edward's income and earning potential is far superior to Sheila's; and (4) Sheila has primary physical custody of the children.

The trial court properly considered the parties' contributions to the acquisition of the residence as a justification for deviating from the presumptive fifty-fifty split. I.C. § 31-15-7-5(1). Sheila owned the residence prior to the parties' marriage, and there is no evidence that suggests Edward contributed to Sheila's acquisition of the residence. Further, the trial court properly considered the parties' disparate incomes and earning potentials. I.C. § 31-15-7-5(5). Edward argues the "difference in Ed[ward's] and

Sheila's incomes is not sufficient to justify" the trial court's judgment. *Appellee's Brief* at 16. Edward's weekly income is $1,050, and Sheila's is $500. Over the course of a 52 week year, this amounts to a difference of $28,600, which is not insubstantial and more than Sheila earns in one year. Finally, the trial court properly considered that Sheila will have primary physical custody of the children. I.C. § 31-15-7-5(3). There is sufficient evidence in the record upon which the trial court was justified in deviating from the statutorily presumptive 50-50 split, and, therefore, the trial court did not abuse its discretion when it awarded Sheila the entire value of the residence.

Judgment affirmed.[2]

KIRSCH, C.J., and RILEY, J., concur.

[2] We also deny Edward's request for an award of attorney fees.